



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 4, 1995

Mr. David A. Anderson
Chief Legal Counsel
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

OR96-2028

Dear Mr. Anderson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 35618.

The Texas Education Agency (the "agency") received two requests for the proposals submitted in response to RFP #701-95-029. You claim that the requested information is excepted from disclosure under sections 552.101, 552.104, 552.110, and 552.111 of the Government Code. We have considered the exceptions you claimed and have reviewed the documents at issue.

You also claim that third parties may have an interest in the information. Therefore, pursuant to section 552.305 of the Government Code, this office informed the third-parties of the requests and of their obligation to claim the exceptions to disclosure they believe apply to the requested information, together with their arguments as to why they believe the claimed exceptions apply. None of the third-parties responded.¹ Therefore, we need consider only those exceptions raised by the agency.

Section 552.104 excepts information that, if released, would give advantage to a competitor or bidder. The purpose of this exception is to protect the interests of a governmental body in competitive bidding situations. See Open Records Decision No. 592 (1991). Section 552.104 is not designed to protect the interests of private parties that submit information to a governmental body. *Id.* at 8-9. This exception protects

¹We also sent letters to the third parties, informing them of this office's decision in Open Records Decision No. 639 (1996), and requesting briefing on whether the second prong of section 552.110 of the Government Code applied to the requested information. We did not receive any responses to this letter.

information from public disclosure if the governmental body demonstrates potential specific harm to its interests in a particular competitive situation. See Open Records Decision Nos. 593 (1991) at 2, 463 (1987), 453 (1986) at 3. A general allegation or a remote possibility of an advantage being gained is not enough to invoke the protection of section 552.104. Open Records Decision Nos. 541 (1990) at 4, 520 (1989) at 4. Furthermore, section 552.104 is inapplicable when the bidding on a contract has been completed and the contract is in effect. E.g., Open Records Decision No. 541 (1990) at 5, 514 (1988) at 2, 319 (1982) at 3. We believe that the contract here has been awarded. Therefore, the agency may not withhold the requested information under section 552.104.

Section 552.110 excepts from disclosure trade secrets or financial information obtained from a person and confidential by statute or judicial decision. There are two parts of section 552.110: (1) trade secrets, and (2) commercial or financial information. These parts must be addressed separately.

The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, which holds a "trade secret" to be:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); see *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), cert. denied, 358 U.S. 898 (1958).² You have not offered any argument

²The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: "(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and other involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others." RESTATEMENT OF TORTS, *supra*; see also Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

or evidence to establish that the requested information is a trade secret. Therefore, the agency has not met its burden under the trade secret part of section 552.110.

In Open Records Decision No. 639 (1996), this office established that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act in applying the second prong of section 552.110. In *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770. "To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure." *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted). the information must be made confidential by a statute or judicial decision. Open Records Decision No. 592 (1991) at 6. The agency here has not established that the requested information is protected from disclosure under the second prong of section 552.110.³

Section 552.111 excepts "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 (1993) at 5-6. In addition, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5.

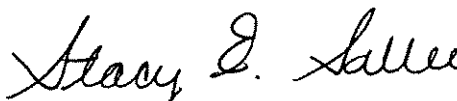
The agency has not submitted any internal memoranda for our review, other than one document dated August 30, 1995. That memorandum is not subject to the request because it did not exist at the time the agency received the request for information. Open Records Decision Nos. 476 (1987), 452 (1986). Therefore, the agency need not produce

³Your only claim of confidentiality under section 552.101 of the Government Code is that third-parties may have an interest in the requested information. As the third-parties did not claim an interest, we need not address this contention under section 552.101. Furthermore, you have not demonstrated and we are not aware of any statute, constitution, or judicial decision that would make the requested information confidential. Therefore, the agency may not withhold the information under section 552.101.

the August 30, 1995 memorandum and may not withhold any of the other submitted information under section 552.111.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



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Open Records Division

SES/ch

Ref.: ID# 35618

Enclosures: Submitted documents

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